

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON LESHAWN ARTIS,

Defendant-Appellant.

UNPUBLISHED

May 8, 2001

No. 217667

Oakland Circuit Court

LC No. 98-161297-FH

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession with intent to deliver 50 grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). The trial court sentenced defendant as a second offender, MCL 333.7413(2); MSA 14.15(7413)(2), to fifteen to forty years' imprisonment. We affirm.

Defendant's first issue on appeal challenges the trial court's denial of a pretrial defense motion to require the prosecution to produce the confidential informant at trial. Defendant argued that the informant was a necessary witness at trial because the informant was actively involved in selling drugs and had access to defendant's car on previous occasions. The prosecution opposed defendant's motion and proposed that the trial court conduct an in camera examination of the informant. Without conducting an in camera examination, the trial court proceeded by reviewing the preliminary examination testimony of two officers involved in the investigation and arrest of defendant on the instant charge. At the preliminary examination, two officers testified to their respective areas of expertise in law enforcement and described their role and observations during the surveillance and apprehension of defendant. Drawing from that testimony, the trial court denied the motion. In particular, the trial court found that the information provided by the informant did not assist defendant personally, that the claim that the informant had access to defendant's car so that the drugs could have been planted was not supported by sufficient evidence, and that in the context of when the informant allegedly had access to defendant's vehicle, it was implausible to believe that defendant could have secreted the drugs in such an inaccessible location within the car.

The identity of an informant is privileged. *People v Underwood*, 447 Mich 695, 703-704; 526 NW2d 903 (1994). However, that privilege is not absolute. *Id.* Disclosure is required if the informant's identity or statement is relevant or helpful to the defense of the accused or is

essential to a fair determination of the case. *Id.* at 704, 707. We review a trial court's denial of a motion to disclose the identity of an informant for an abuse of discretion. *People v Rodriguez*, 65 Mich App 723, 728-729; 238 NW2d 385 (1975). Because this decision requires the trial court to make factual findings, we review those findings for clear error. *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991); *People v Acosta*, 153 Mich App 504, 509; 396 NW2d 463 (1986).

Here, we find no clear error in the trial court's findings of fact. Defendant presented no evidence in support of his motion and the facts relied upon by the trial court as contained within the preliminary examination transcript are undisputed. Further, we find no abuse of discretion in the decision to deny the motion. Other than suggesting, without any supporting evidence that the drugs were planted by the informant, defendant failed to offer any credible reason to require extinguishing the informant privilege. Moreover, we agree with the trial court that the facts surrounding defendant's claim that the drugs were planted by the informant do not make a credible case for the proposition that the informant set up defendant. Accordingly, defendant's claim of error is without merit.

Next, defendant asserts that his constitutional right to confront his accusers was violated when the prosecutor elicited from the police officers hearsay testimony regarding the content of the information received from the confidential informant. Before addressing this claim we must determine whether the issue is preserved or forfeited. Defendant suggests that the issue is preserved because he requested disclosure of the confidential informant and the trial court denied that motion and any further objection would have been futile. We believe that defendant's reliance on the trial court's denial of his motion to produce the informant at trial for preservation of his confrontation clause claim is without merit. There is no basis to equate the motion to produce with the testimony taken at trial. Whether grounds exist to waive the informant privilege is a separate and distinct issue from whether the content of the information that resulted in a police investigation is admissible at trial. Here, defendant sought disclosure of the informant so that he could attempt to show that the informant planted the drugs. Those proofs are different from the testimony admitted at trial regarding the actual things told to the investigating officer by the non-testifying informant that caused the officers to initiate the investigation. Because defendant raised no objection to the admission of the content of the informant's communications to the investigating police officers, the issue is forfeited. See *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997) (where a party fails to timely object to hearsay, the issue is unpreserved).

We review forfeited constitutional issues for plain error affecting defendant's substantial rights and even if plain error occurs we will reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity or reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Arguably, in this case the admission of the non-testifying informant's information constituted plain error that affected defendant's substantial right to confront his accusers. The prosecution argues that the evidence at issue was not introduced to prove the truth of the informant's communications to the police, but rather, to show why the officers were at the location and conducting an investigation. However, testimony offered for this purpose should be relatively brief and set forth the circumstances in a limited manner. *People v Wilkins*, 408 Mich

69, 72-73; 288 NW2d 583 (1980); *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000). Here, however, the testimony was extensive. Virtually every detail of the information supplied by the informant to the police was placed before the jury. The extent of the testimony presented far exceeded that which was reasonable and necessary to establish why the officers were at the incident location. Consequently, defendant's right to confrontation was compromised by the admission of this testimony.

Nevertheless, we conclude that defendant cannot demonstrate that the error resulted in an innocent person being convicted or that the error seriously affected the fairness, integrity or reputation of the judicial proceeding. Our review of the evidence presented at trial persuades us that the wrongfully admitted evidence could have had only a marginal effect at most and the other testimony in the case established defendant's guilt. Nor do we find that the judicial process itself was implicated. The problem here is not whether all the evidence should have been excluded, but only that more testimony was introduced than is permitted. Under these circumstances, we cannot say that the trial was seriously affected. Therefore, defendant is not entitled to any relief. *Carines, supra*.

Defendant's third claim is that the prosecutor and the police witnesses improperly bolstered the credibility of the confidential informant by repeatedly referring to the informant as being "reliable." Like the prior issue, defendant maintains this issue was preserved by his motion to produce. For the same reasons stated previously, we disagree. Accordingly, the claim is forfeited and defendant is entitled to relief only if plain error affecting a substantial right occurred. *Carines, supra*. Because the alleged error could have been cured by a timely objection and a curative instruction, no plain error affecting defendant's substantial rights exists. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Next, defendant argues that the trial court erred in denying defendant's motion to suppress the seized drugs because the evidence was obtained in violation of defendant's Fourth Amendment right to be free from unreasonable searches and seizures. In particular, defendant maintains the police stopped his vehicle without having any reasonable suspicion of criminal activity. We disagree.

In this case, police officers, acting on information supplied by an informant known to one of the officers for approximately 2½ years and from whom the officer had received reliable information on numerous previous occasions regarding criminal activity involving drugs, commenced surveillance of a particular gas station. Based on the information, the officers were looking for a black male in his mid-20's, with short braids in his hair, of average height and weight, driving a mid-80's silver or gray two-door Cutlass- or Monte Carlo-type vehicle. The informant indicated the individual would be in possession of approximately three ounces of cocaine which would be secreted within the actual confines of the vehicle. The informant further indicated that the individual would be at the gas station to make a drug transaction and that these events would occur at approximately 9:00 p.m. Near that time, defendant was observed standing by the rear of a 1985 two-door silver or gray Buick Regal, then standing by the front of the vehicle with its hood open. Defendant was not seen pumping gas. Defendant repeatedly scanned the parking lot in a deliberate fashion. Nobody came in contact with defendant. The officers drove into the gas station and confirmed that defendant matched the description given by the

informant. After a time, defendant lowered the hood and again scanned the parking area of the gas station. Next, defendant entered the car, cruised slowly through the gas station lot. Again, defendant parked in the gas station lot, then exited the vehicle, scanned the lot once again and then walked into the gas station's building. He remained in the building for a short time, then returned to his vehicle and drove out of the lot. A short time later police made the investigative stop that defendant challenged in his motion to suppress. The trial court denied the motion.

We review a trial court's ruling on a motion to suppress evidence for clear error. *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993). The trial court's ruling is entitled to deference. *Id.* This Court will not reverse absent a definite and firm conviction that a mistake was made. *People v Armendarez*, 188 Mich App 61, 65-66; 468 NW2d 893 (1991). The touchstone of a reviewing court's analysis of a motion to suppress based upon an alleged violation of the Fourth Amendment is always the reasonableness in all the circumstances of the governmental invasion of the citizen's personal security. *Id.* at 66. When evaluating the reasonableness of stopping a motor vehicle on the basis of an informant's tip, pertinent considerations include: "(1) the reliability of the informant, (2) the nature of the information given to the police, and (3) the reasonableness of the suspicion in light of these factors." *Id.* at 67-68.

Here, the trial court conducted precisely this analysis. Giving deference to the trial court's ruling, we find no clear error. The evidence established the reliability of the informant. The officers observations reasonably corroborated the information that the informant supplied and the conduct of defendant while under observation was reasonably consistent with an individual intending to meet someone to conduct a drug transaction.

Defendant next argues that there was insufficient evidence to sustain the jury's verdict against him and thus he was convicted in violation of his right to due process. Specifically, defendant contends that there was no evidence that the cocaine found in the car he was driving belonged to him. We disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998).

Possession may be either actual or constructive. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999). "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe, supra* at 521. However, an individual's presence, by itself, where drugs are found is insufficient to prove constructive possession. *Id.* at 520; *Griffin, supra* at 34-35. This Court has stated:

Constructive possession may be found where a defendant knowingly has the power and intention to exercise dominion or control over a substance, either directly or through another person, or if there is proximity to the substance together with indicia of control. Circumstantial evidence and reasonable

inferences arising from the evidence are sufficient to establish possession. [*People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991) (citations omitted).]

Here, defendant was found driving a car registered to his wife that contained cocaine secreted within the confines of the vehicle. Police testimony indicated that drug dealers often use another person's car to avoid pertinent forfeiture laws. Further, the testimony established that defendant was acting suspiciously at a gas station and in a manner consistent with an individual who was intending to engage in a drug transaction. In addition, the amount and packaging of the cocaine is indicative of possession for distribution, not personal use. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved possession of the cocaine beyond a reasonable doubt.

Finally, defendant argues that he must be resentenced because defendant received a disproportionate sentence and because the trial court failed to state on the record its reasons for the sentence imposed. We disagree.

We review the proportionality of a sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A defendant's sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636. "Legislatively mandated sentences are presumed to be proportionate and valid." *People v Johnson (On Remand)*, 223 Mich App 170, 175; 566 NW2d 28 (1997).

Here, the trial court imposed a minimum sentence of a term less than that allowed by law, and a maximum no greater than that allowed by law. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); MCL 333.7413(2); MSA 14.15(7413)(2). Considering the circumstances of the offense and defendant, defendant's sentence is proportionate. *Milbourn, supra*; *Johnson, supra*. Even if the trial court failed to sufficiently articulate on the record the basis for its determination, remand is not necessary because defendant's sentence is proportionate and further articulation by the trial court would serve no pertinent purpose. See *People v Poppa*, 193 Mich App 184, 191; 483 NW2d 667 (1992).

Affirmed.

/s/ Henry William Saad

/s/ Joel P. Hoekstra